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IN THE

Supreme Court of the United States

October Term, 1965

No. 1211

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION, HARRY COREN, SALVATORE GRAZIANO and EDWIN S. VILE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. FRANCIS HAYDEN
Attorney for Petitioners
36 West 44th Street
New York, N. Y. 10036

Of Counsel

STICKLES, HAYDEN, KENNEDY,
HORT & VAN STEENBURGH
36 West 44th Street
New York, N. Y. 10036

LEONARD M. SAGOT
2 Penn Center Plaza
Philadelphia, Pa. 19102

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Pennsylvania Refuse Removal Association, Harry Coren, Salvatore Graziano and Edwin S. Vile, pray that a writ of certiorari issue to review the four judgments of the United States Court of Appeals for the Third Circuit entered against the said petitioners, respectively, on March 14, 1966 (Case Nos. 15,529, 15,530, 15,532 and 15,533—D. C. Criminal No. 21558).

Opinions Below

The opinion of the Court of Appeals by Circuit Judge McLaughlin (Appendix A, pp. 39-44, *infra*) is not yet officially reported but it appears in 1966 C. C. H. Trade Cases, ¶71,711.

The opinion of the District Court (Luongo, D. J.) denying a motion for judgment of acquittal notwithstanding the verdict is reported at 242 F. Supp. 794 (1965). It is also set out in the Appellants' Appendix, pp. 202a to 212a.

There was no opinion on the denial of a pre-trial motion to dismiss the indictment for lack of interstate commerce beyond a comment in the order of denial made by District Judge Clary on July 9, 1964, indicating that the Court is of the opinion that the points raised relate more to issues of fact to be decided at trial (18a to 19a).[1]

Jurisdiction

The judgments of the Court of Appeals (Appendix B, p. 45, *infra*) were dated and entered on March 14, 1966. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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1. References are thus made to the Appellants' Appendix below. Similar references to the Appellee's Appendix below are distinguished by the page reference suffix b, *e.g.*, 18b.

Questions Presented

1. Whether as a matter of law the local business of private refuse removal in the Philadelphia area[2] is a single operation including both the removal and the ultimate disposal of the refuse?

2. Whether, even assuming that such business is a single operation, the entire local business in that area is in the stream of interstate commerce merely because some removers, as a matter of their own choice, dump some of the refuse in New Jersey?

3. Whether such local business and any conspiracy or combination relating to it could, as a matter of law, affect interstate commerce?

4. Whether the issues as to interstate commerce and specific intent to restrain it in violation of the Sherman Act were improperly withdrawn from consideration by the jury?

---

2. In this case "the Philadelphia area" was defined in the indictment as being limited to the counties of Philadelphia, Bucks, Delaware and Montgomery, all in the Commonwealth of Pennsylvania.

Statutes Involved

Section 1 of the Sherman Act (26 Stat. 209 (1890), as amended, 15 U. S. C. §1) provides in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Statement of the Case

1. Jurisdiction of the Courts below

The case below began by an indictment under Section 1 of the Sherman Act (15 U. S. C. §1) returned on October 30, 1963. The case was therefore one charging an offense in violation of an act of Congress protecting trade and commerce against restraints and monopolies, and so is one of which the District Court had original criminal jurisdiction under 18 U. S. C. §3231 (62 Stat. 826). The Court of Appeals had jurisdiction of the appeal from the judgment of the District Court under 28 U. S. C. §1291 (65 Stat. 726; 72 Stat. 348).

2. The proceedings in the District Court

The indictment returned on October 30, 1963 charged that the defendants, an association of refuse removers and its officers, had combined and conspired with unnamed co-conspirators in restraint of interstate trade and commerce in private refuse removal in "the Philadelphia area", a designated area entirely within the commonwealth of Pennsylvania, in a period from 1960 to October 30, 1963 (9a, 13a).

A pre-trial motion to dismiss the indictment for lack of interstate commerce was denied by District Judge Clary with the comment in his order "* * * the Court is of the opinion that the points raised by the defendants relate more to issues of fact to be decided at trial than to the issue to be decided here, *viz.*, the sufficiency of the Indictment * * *" (10a, 18a).

After a five-week trial, during which a further motion to dismiss for lack of interstate commerce made at the close of the Government's case and renewed at the close of the whole case was denied, the case was submitted to the jury which returned a verdict of guilty as to all defendants (166a; Motions at Tr. 1203-1241; 2127 not printed).

A post-trial motion for judgment of acquittal notwithstanding the verdict or for a new trial was denied (202a).

3. The facts

For the purpose of the appeal to the Court of Appeals, it was assumed that the Government's evidence was sufficient to justify a finding that the defendants engaged in practices amounting to efforts to allocate customers, to refrain from competing for customers, and to maintain prices for refuse removal. Thus a verdict establishing violation of the Sherman Act would have been justified, provided the jurisdictional element of interstate commerce was present. It was, of course, asserted that this element was lacking.

In essence, the petitioners assert that the Government failed to show that the business involved was in interstate commerce, or affected interstate commerce, and accordingly there was no jurisdiction in the courts below to support a finding that the defendants, or any of them, were guilty of having participated in a contract, combination or conspiracy in restraint of interstate trade or commerce.

In Philadelphia refuse removers were required to hold municipal licenses.[3] In 1962 there were 210-220 holders of such licenses, who operated 800 vehicles (101a, 106a).

The evidence as to actual contractual arrangements as to removers and customers was scanty. No customers were called as witnesses. Admittedly, removers did not like to be bound by written contracts (45a-46a). No contracts were shown—only two proposals were offered in evidence, and neither made any reference to disposal (182a-183a). From what appeared arrangements were made with the customers

3. Philadelphia Ordinances, §9-604 (1959).

to pick up refuse at their premises on a daily or weekly or monthly basis.

When a remover took trash from a customer's premises, the trash belonged to the remover, and he could dispose of it as he saw fit (57a-58a). One witness considered the service as rendered at the customer's premises in Philadelphia (40a). Another described it as "calling for a removal of trash from a customer's premises" (45a; 93a-94a). Still another witness asserted that the customer had nothing to do with the trash once it was removed (58a-59a). Another described his service as "keeping the property free and clear of trash" (108a).

A remover obviously took any salvage he could find in the refuse without accounting to the customer. In the words of the chief Government witness, who was accepted by the District Court as an expert witness (5b), speaking of what removers did with trash, "Some haulers take it to the city incinerator and it is burnt. Other fellows take it to the landfill, and some of them salvage. What is left over, is not good for salvage, that is deposited in the landfill also" (5b).

The Philadelphia incinerator was available to removers at a price per ton if the material was acceptable as "clean and combustible" (38a). *Cf.* Philadelphia Ordinances, Section 9-604, Sub. Par. (1) (a) (2.-3.) and (2) (a) and (b).

The only immediate alternative to incineration was dumping at a private dump or landfill. There were four or five dumps in Philadelphia County, three in Delaware County, six in Montgomery County, and eight in Bucks County,

which were reduced to four in that county between 1960 and 1962 (100a). Many removers used those Pennsylvania dumps for material which they did not offer for incineration (48a-50a; 52a-54a; 56a; 66a-67a; 85a-86a; 109a).

Fourteen removers dumped some or all of the refuse which they collected in Philadelphia at a private dump or landfill in New Jersey during the indictment period (42a-44a; 48a-50a; 52a-55a; 60a-67a; 70a-99a).

The aggregate of refuse dumped in New Jersey by those removers was but part of their total collections of refuse in the Philadelphia area, and the amounts which they dumped in New Jersey varied from year to year. The amounts of such collections ranged from the lowest figure of $2,023 to the highest figure of $138,486 (43a-44a; 50a-60a; 68a-71a; 75a-77a; 80a-81a; 84a; 87a-99a). Amounts expended for dumping fees in New Jersey correspondingly varied.

There was no evidence of the precise total number of refuse removers operating in the Philadelphia area during any of the indictment period, nor of the total volume of refuse removed in that area during that period. As a result it is impossible to determine the percentage of Philadelphia area collections which found its way to New Jersey. Obviously, most of that refuse found its way to the Philadelphia incinerator or to dumps in Philadelphia.

For all that appears the amount dumped in New Jersey may be but one tenth of one per cent of the collections in the Philadelphia area. It is clear, however, that the amount must have been minor, and that such dumping was for-

tuitous, incidental, and remote from direct contractual arrangements with the customers.

There was no claim that dumping privileges were monopolized or restrained or that dumping fees were affected by any action of the defendants. The Government relied entirely upon the "in commerce" theory, asserting that defendants' acts constituted a restraint of interstate commerce. This argument depended entirely upon the Government's contention that the dumping of some Philadelphia collections in New Jersey established the necessary element of interstate commerce.

The trial judge took the view that it was the Court's function to define the scope of the business as a matter of law, that the local business of refuse removal encompassed not only the picking up of refuse at a customer's premises, but also the carrying away and disposal of such refuse, and that evidence of dumping in New Jersey "amply supported the Government's burden to establish that defendants' activities were within the flow of interstate commerce" (204a-206a). In the same opinion the trial judge rejected any notion that it was incumbent upon the Government to show that defendants' activities had an effect upon interstate commerce because of the *per se* rules under which an effect on interstate commerce is presumed (207a-208a).

The defendants contend that the *per se* rules cannot be applied until the existence of interstate commerce is first established, and that the existence of such commerce may not be presumed.

Another question arising in connection with the trial is in relation to a supplemental charge to the jury. Prior

to the charge and in discussions of requests to charge in the absence of a jury the trial judge indicated that he would withdraw from the consideration of the jurors all evidence relating to some removers who were New Jersey residents, but who were engaged in refuse removal in Philadelphia. Government counsel indicated that he took no exception to this ruling (113a, 160a). In the main charge the trial judge instructed the jury as follows (136a):

> "* * * If you find from the evidence, beyond a reasonable doubt, that refuse removers, who collect refuse in the Philadelphia area, dispose of appreciable quantities of such refuse in New Jersey, then I instruct you that the interstate commerce element of the offense with which the defendants are charged has been established.
>
> What I mean to exclude by that definition is the casual dumping of a lot of trash. Anything more than a casual dumping of a load or two of trash, anything that has any degree of consistency or regularity, or involves any appreciable quantity, would satisfy the requirement of interstate commerce * * *"

After various exceptions to the main charge were noted, in the absence of the jury, the trial judge called back the jury and gave a further charge (162a). In this further charge which covers several matters, the Court made the following additional charge on the subject of interstate commerce (164a):

> "* * * There was also some objection taken to the manner in which I left the interstate aspect of this case.
>
> I said to you that if you find that refuse removers pick up trash in Pennsylvania and haul an appreci-

able quantity of it to New Jersey, then you may find that the interstate aspect of the crime has been satisfied. I recognize that 'appreciable' is a very vague term.

I then went on to say to you that you are to consider that as opposed to, as I think I used the expression, a casual load or two taken over to New Jersey. *All I mean to convey to you, members of the jury, is that there was a sufficient movement of such trash from Pennsylvania to New Jersey that it could not be characterized as something that was just casual or inadvertent.* (Italics supplied.)

If you find that this was a part of a regular and consistent movement of trash from Philadelphia to New Jersey, if you find that was part of the business of removing trash from Philadelphia area by these refuse collectors who operate in the Philadelphia area, then I say to you that the interstate commerce aspect of the crime has been established * * *."

The italicized sentence above, which was in the trial judge's last word on the subject, is a definite instruction that there was a sufficient movement of trash from Pennsylvania to New Jersey; that it could not be characterized as casual or inadvertent. When this instruction is coupled with what was said before, the jury had to follow the Court's plain statement "Then I instruct you that the interstate commerce element of the offense with which the defendants are charged has been established" (136a).

Whether the two portions mentioned are considered as inconsistent or whether the later statement by the Court when coupled with the earlier one is treated as a flat in-

struction that the interstate commerce element was established, the factual questions of interstate commerce were not clearly put before the jury with an instruction as to the necessity of making a finding of the violation in this regard beyond a reasonable doubt.

The trial judge expressed more than an opinion in his charge. In the main charge he gave an instruction as to the law subject only to a question of casualness or inadvertence, but then this proviso was later eliminated with the result that in the supplemental charge the question was really withdrawn from consideration.

In this fashion the basic factual issues were determined by the trial judge as a matter of law, and the issue as to interstate commerce was effectively withdrawn from all consideration by the jury.

Accordingly, the verdict does not import any finding beyond a reasonable doubt that there was intentional violation of Section 1 of the Sherman Act, that is, "that there was a contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several states * * *." The verdict of the jury cannot stand without this essential finding.

4. The decision of the District Court on the the motion to set aside the verdict

On the motion the District Court took the position that in the refuse removal business, collection and disposal are inseparable (204a). Proceeding from this legal conclusion, the Court found that the Government had shown that

the business was "in interstate commerce" by reason of the fact that fifteen witnesses testified that during the indictment period "each had collected refuse in Pennsylvania, and each, with varying degrees of regularity, dumped substantial quantities of it in New Jersey" (205a-206a).

The defendants had argued that the business was not in interstate commerce and therefore the Government had to show that the business, being local, had a substantial effect upon interstate commerce. The District Court, however, misappprehending this argument, went on to find that the defendants were contending that the Government failed to establish that the activities had an effect on interstate commerce, and then held that the activities were *per se* violations of the Sherman Act, and that the effect upon interstate commerce is presumed (206a-207a).

The defendants' argument in this connection had really been first that the business was not in interstate commerce, and secondly, that it had no effect upon interstate commerce.

The District Court also dismissed the defendants' argument that the issue as to interstate commerce had been taken away from the jury, and held that the argument was based upon an isolated sentence taken out of context, and that the charge as a whole properly left the question to the jury (210a-211a).

The defendants had also argued in support of their motion that rubbish, trash and garbage were worthless, and not in any sense a commodity that was not the sub-

ject of any trade or commerce within the meaning of the Sherman Act. The District Court dismissed this argument (211a), holding that the real subject of "trade or commerce" was not worthless debris, but the simple service of removing and disposing of it, and that this service was encompassed within the scope of the Sherman Act, citing *U. S.* v. *National Association of Real Estate Boards,* 339 U. S. 385, 488-492 (1950). The case cited, of course, arose in the District of Columbia, and involved Section 3 of the Sherman Act, as to which interstate trade or commerce is not necessary.

5. The decision of the Court of Appeals

The Court of Appeals here said simply (1) that it was satisfied that the factual holding of the trial judge that the hauling and disposal of refuse was an integral part of the refuse removal business was entirely correct; (2) that the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state as a vital element of the one business operation was plainly a proper subject of interstate commerce; (3) that this is true despite the claim that the refuse was the removers' property and (4) that the fact that the volume of refuse carried to New Jersey may have been relatively small did not in any way restrict the application of the Sherman Act.

As to the defendant's complaint in regard to the supplemental charge, the Circuit Court took the view that the word "if" was unintentionally omitted by the judge or the stenographer between the words "that there". The Court also stated: "Just as obviously the word 'if' was needed for the completion of the sentence" (App. A, p. 43, *infra*).

This view of the questioned portion of the charge had never been raised before. The only suggestion going in that direction was in a footnote in the Government brief in the Court of Appeals:

> "If an implied if were inserted into the sentence in question it would read: 'All I mean to convey to you, members of the jury, is that [if] there was a sufficient movement of such trash from Pennsylvania to New Jersey [,] that it could not be characterized as something that was just casual or inadvertent.'
>
> If a period is moved in the portion of the charge in question it would read:
>
> I said to you that if you find that refuse removers pick up trash in Pennsylvania and haul an appreciable quantity of it to New Jersey, then you may find that the interstate aspect of the crime has been satisfied. I recognize that 'appreciable' is a very vague term.
>
> I then went on to say to you that you are to consider that as opposed to, as I think I used the expression, a casual load or two taken over to New Jersey. *All I mean to convey to you, members of the jury, is that there was a sufficient movement of such trash from Pennsylvania to New Jersey that it could not be characterized as something that was just casual or inadvertent if you find that this was a part of a regular and consistent movement of trash from Pennsylvania to New Jersey.* If you find that this was part of the business of removing trash from the Philadelphia area by these refuse collectors who operate in the Philadelphia area, then I say to you that the interstate commerce aspect of the crime has been established * * *" (Italics supplied.)

The Government did not suggest that there was any inadvertent omission by the Court or the stenographer.

The Government stated (*id.* p. 22): "At most the sentence in question was lapse of language. In assessing the effect of the charge before the jury it must be borne in mind that the charge was delivered orally and that the impression upon the jury is not the same as one obtains when the sentence in question is read in isolation."

The Government sought an implication, not a finding of an inadvertent omission. The Court of Appeals, however, has gone beyond the Government's suggestion, and has found that the word "if" was actually needed for the completion of the sentence. It did not suggest, however, what is to become of the two "that"s.

The way the Court of Appeals read the sentence, it would have stated to the jury:

> "All I mean to convey to you, members of the jury, is that [if] there was a sufficient movement of trash to New Jersey that it could not be characterized as something that was just casual or inadvertent."

The Government's ultimate proposed reading was to move a period and combine a sentence so that it would have come out as follows:

> "All I mean to convey to you, members of the jury, is that there was a sufficient movement of such trash from Pennsylvania to New Jersey that it could not be characterized as something that was just casual or inadvertent if you find that this was a part of a regular and consistent movement of trash from Pennsylvania to New Jersey."

In any event, the Court of Appeals found that in the context of the charge it was most doubtful that the sup-

plemental charge sentence caused any confusion whatsoever to the jury, and that it was completely cured by the next succeeding sentence which the Government would have partly split and added to the questioned sentence, as noted above.

Finally, the Court of Appeals indicated that there had been no objection to the now disputed sentence, and no plain error was involved, and that the point was not before the Court at all, but had been disposed of on the merits, so that there would be no possible doubt regarding it (App. A, p. 44, *infra*).

Reasons for Granting Writ of Certiorari

1. The case presents a new and unusual application of the Sherman Act.

The decision below approves a novel application of the Sherman Act to a new field generally considered a matter primarily of local concern.

Worthless trash, rubbish and garbage having been abandoned by the owner of premises in the Philadelphia area into the hands of a locally licensed collector, and having been raked over locally by the collector for any possible salvage which he considers his property has been treated as a commodity in interstate commerce because some portion of all collections in the area were carried across the Delaware River by fourteen collectors out of more than 200 licensed collectors operating in the City of Philadelphia alone, and dumped there as a matter of the collector's own choice.

The alleged combination and conspiracy was not claimed to have had anything to do with dumping or dumping facilities. In fact the alleged effects were alleged in the indictment to have occurred only in "the Philadelphia area" which is entirely within Pennsylvania (Indictment, par. 12, 15a). Nonetheless the entire industry in four counties of Pennsylvania has been subjected to the application of the Sherman Act because of something done locally with only alleged local effects. It cannot be denied that the vast majority of the operators dumped at the City Incinerator or at local dumps. Nor can it be asserted that any customer knew or cared where his refuse was going to be dumped except for those being given a separate charge for City Incinerator fees (35a-38a).

This Court has granted a petition for certiorari because among other things the case presented a new and unusual application of the Sherman Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 135 (1961); petition granted 362 U. S. 947.

In view of the possible widespread effects of the decision below on normal rubbish, trash and garbage removal in all the states where there may be some dumping across state lines, the decision below presents an important question in the administration of the Sherman Act. The presence of such a question has been the basis on which this Court has granted a petition for certiorari. *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, 210 (1959).

An example of how the question can arise appears in an unreported ruling in the Interstate Commerce Com-

mission Bureau of Motor Carriers, in *Matter of Advanced Waste Handling Equipment Company, Inc.*, which is printed in the Government Appendix, p. 105b. In that case the Bureau accepted the position that the trash removal beyond the commercial zone (involving removal from Ford Motor Company plant in New Jersey and dumping in New York) did not require a certificate of authority from the Interstate Commerce Commission. The distinction made there was

> "Customer in the disposal service seeks only to be divested of goods which he no longer needs or wants. He does not care, and may not even know to where they will be taken. Then, too, in a normal transportation situation the *shipper's* goods are transported to a designated destination where in a disposal service the goods, when turned over to the 'disposer', are no longer those of the *shipper*, so they can not be said to be transported for him. Title to the goods is transferred to the 'disposer' to do with as he sees fit".

If local private refuse removers are to be held to be engaged in interstate commerce because of some incidental dumping across state lines and are therefore considered to be engaged in interstate transportation, and ultimately come under the jurisdiction of the Interstate Commerce Commission as carriers for hire the problems which would confront them are strikingly illustrated in *Vincent Montone Transportation, Inc.* v. *United States,* 231 F. Supp. 484 (N. D. Pa. 1964). See also: *Steere Tank Lines, Inc.* v. *United States,* 330 F. 2d 719 (5th Cir., 1963).

2. The decision below is in conflict with decisions of this Court and other Courts of Appeal.

The District Court indulged in a theory that a mere crossing of state lines of more than a load or two of refuse placed the entire business "in commerce" by some kind of a relating back. The District Court also thought that dumping and collection were so inextricably intertwined that all were part of a single service, and that the case really involved an interstate service. This, we think, was wholly unsupported by any evidence in this case.

There was not a single instance where anything was shown to have been contracted for except the immediate removal of the refuse at the customers' premises. And yet because some removers for reasons of their own happened to carry a particular load across to New Jersey, the removal from the premises in Philadelphia was thrust into interstate commerce, and then the whole industry was pulled in, and finally an admittedly local conspiracy involving a local association was also pulled in, and then the *per se* rules were applied and the local conspiracy was thereupon conclusively presumed to affect interstate commerce.

The judgments below run contrary to the trend of many decisions. In disregarding the fact that no customer contracted for interstate dumping, and that there was no certainty that state lines would be crossed for dumping, the decision below disregards the rule in *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179 (1906), that there should be certainty of crossing, and not a mere possibility. See also: *Moore* v. *N. Y. Cotton*

Exchange, 270 U. S. 593 (1926). It uses a relation back which was rejected in cases of retail sales of gasoline which were held not to be in interstate commerce because some customers crossd state lines after a local purchase. See: *Spencer* v. *Sun Oil Co.,* 94 F. Supp. 408, 411 (D. C. Conn., 1950). Cf. *Lieberthal* v. *North Country Lanes, Inc.,* 332 F. 2d 269 (2d Cir. 1964), affirming 221 F. Supp. 685 (S. D. N. Y., 1963), where interstate travel of bowlers was found insufficient to place bowling alleys in interstate commerce. See also: *Page* v. *Work,* 290 F. 2d 323, 332 (9th Cir. 1961) affirming 178 F. Supp. 184 (D. C. S. D. Cal., 1959), cert. den. 368 U. S. 875 (1961).

Furthermore, since local refuse removal in this case was erroneously found to be "in commerce" as a matter of law by both the District Court and the Court of Appeals, there was no attempt to show that any of the activities of the defendants had any effect whatsoever upon interstate commerce. It is well settled that a purely local activity cannot contravene the Sherman Act without a finding that such activity had a direct and substantial effect upon interstate commerce.

See:

Las Vegas Merchant Plumbers Ass'n v. *United States,* 210 F. 2d 732, 747 (9th Cir. 1954), cert. den. 348 U. S. 817 (1954), *supra;*

Heart of Atlanta Motel, Inc. v. *United States,* 379 U. S. 241, 258 (1964);

Katzenbach v. *McClung,* 379 U. S. 294, 302 and 273 (1964);

Evanston Cab Co. v. *City of Chicago,* 325 F. 2d 907 (7th Cir. 1963), cert. den. 377 U. S. 943 (1964);

Elizabeth Hospital v. *Richardson,* 269 F. 2d 167 (8th Cir. 1959), cert. den. 361 U. S. 884 (1961);

U. S. v. *Oregon State Medical Society,* 343 U. S. 326 (1952);

Lieberthal v. *North Country Lanes, supra,* 332 F. 2d 269 (2d Cir. 1964);

Fletcher Co. v. *Rock of Ages Corp.,* 326 F. 2d 13 (2d Cir. 1963);

Hotel Phillips v. *Journeymen Barbers,* 195 F. Supp. 664, 666 (D. C. W. D. Mo. 1961, aff'd *per curiam,* 301 F. 2d 443 (8th Cir. 1962);

Lawson v. *Woodmere, Inc.,* 217 F. 2d 148, 149 (4th Cir. 1954);

Martin v. *National League,* 174 F. 2d 917 (2d Cir. 1949).

The petitioners here questioned whether refuse could ever be in trade or commerce, citing *Apex* v. *Leader,* 310 U. S. 469, 492, 495 (1940), where Mr. Justice Stone pointed out that this Court had never applied the Sherman Act in any case "unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services". "Refuse" is, of course, a general word often used to denote anything worthless, waste material, garbage, trash, rubbish. See: Webster's New Collegiate Dictionary (1961), "refuse", "garbage", "trash", "rubbish". See also: Philadelphia Ordinances (1959), §9-604, where "refuse" is defined as all discarded waste materials including garbage and combustible and non-combustible waste. See also: 76 C. J. S., "Refuse", p. 506; 38 C. J. S., "Garbage", p. 189; 87 C.J.S., "Trash", p. 905; and 77 C. J. S., "Rubbish", p. 543.

The business of refuse or garbage removal, by its very nature, is a unique business of a strictly local character. Indeed this very uniqueness was relied upon to justify a finding that the states retained full power over it to regulate for the protection of public health, and likewise the power to regulate private local removers.

See:

California Reduction Co. v. *Sanitary Reduction Works*, 199 U. S. 306 (1905);
Gardner v. *Michigan*, 199 U. S. 325 (1905);
City of Rochester v. *Gutberlett*, 211 N. Y. 309 (1914);
Wiggins v. *Town of Somers*, 4 N. Y. 2d 265 (1958).

In that connection the City of New York has gone so far as to require licensed removers to have written contracts with customers, and regulates maximum rates which may be charged.

See:

P. & A. Carting Co. v. *City of New York*, 7 Misc. 2d 815 (N. Y. Sup. Ct. 1956);
7 McQuillin on Municipal Corporations (3rd ed. 1949), p. 90.

These authorities demonstrate that refuse and garbage collection and disposal all are essentially matters for the state and its municipalities, and not matters for indirect regulation through attempted applications of the Sherman Act. The same authorities show that collection and dis-

posal are not a trade or business in the sense of the Sherman Act but rather a method by which removal is accomplished in the interest of promoting the health and safety of the people of the local municipality.

While local regulations must not impose a direct burden upon interstate commerce, they will control even though interstate commerce is incidentally or indirectly affected.

See:

5 McQuillin on Municipal Corporations (3rd ed. 1949), pp. 622-623.

The defendants never had any reason to believe that their activities were "in the stream of commerce", or had or could have any effect on "interstate commerce" and thus constitute a violation of the Sherman Act. Ordinarily, in a novel case, the Government would have proceeded by a civil case rather than a criminal indictment in order to obtain a determination of the application of the Act to a novel situation.[4]

The trial judge recognized that refuse is a worthless and useless commodity, but he considered the real subject of this case to be not the refuse, but the service of removing it (211a). The Court of Appeals did not advert to this reasoning, but treated the defendants' argument as an attempt to split the refuse business into two parts (App. A, p. 41, *infra*).

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4. See Report of the Attorney General's National Committee to study the Antitrust Laws (Government Printing Office, March 31, 1955), p. 349.

This completely overlooks the fact that both the transportation across the state lines and the ultimate disposition in New Jersey is so remote from the customer or customers whose trash, rubbish and garbage happen to make up the contents of the truck that it is inconceivable that any relation between the original customer and the contents of that truck could be the subject of any legal recognition whatsoever, much less a holding as a matter of law that the river crossing and the ultimate disposition relates back to the doorsteps of Philadelphia as an integral part of an interstate service carried on in the stream of interstate commerce and having an actual or presumed effect upon interstate commerce.

The authorities cited by the Court of Appeals are readily distinguishable. *Hoke* v. *United States,* 227 U. S. 308 (1912) involved the White Slave Traffic Act (36 Stat. 825), which specifically prohibited the transportation of women in interstate commerce for immoral purposes. In the present case there was no Federal prohibition of the carrying of refuse across state lines.

United States v. *Hill,* 248 U. S. 420 (1919) involved the "Reed Amendment" (39 Stat. 1058, 1069) which prohibited the transportation of intoxicating liquors into a state the laws of which prohibit the manufacture or sale therein of such liquors for beverage purposes. The respondent there in the case carried a quart of whiskey from Kentucky into West Virginia while riding on a trolley car. There again the specific act of transportation was prohibited by the Act. In the present case, however, there was no specific prohibition of the incidental carriage of refuse across the Delaware River.

In *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601 (1939), this Court held that the Congress had plenary power to regulate interstate commerce and that such power extended to all such commerce "be it great or small" and that the unfair labor practices in this case threatened consequences to interstate commerce which were immediate and certain. In the present case the alleged combination and conspiracy had nothing to do with anything in New Jersey or transportation between Pennsylvania and New Jersey.

In *Las Vegas Merchant Plumbers Assn.* v. *United States,* 210 F. 2d 732, 739 (9th Cir. 1954), cert. den. 348 U. S. 817 (1954), it was found that the distribution, selling and installation of supplies was an integral part of, and necessary to, the movement of such supplies in interstate commerce.

In *United States* v. *Frankfort Distillers, Inc.,* 324 U. S. 293, 296 (1945), this Court held that whatever was the ultimate object of the conspiracy, the means adopted for it reached beyond the boundaries of Colorado, that the combination concerned itself with the type of contract used in interstate commerce sales, and used the exercise of coercive powers to compel producers outside of Colorado to enter into price maintenance contracts (p. 298).

3. The disputed portion of the supplemental charge took the interstate commerce question away from the jury, so that the verdict does not import any finding on the essential jurisdictional element of the offense.

Admittedly, the convictions below must be supported by a finding beyond a reasonable doubt that the activities of the defendant were in the stream of interstate commerce or had a direct and substantial effect upon interstate commerce, and that there was specific intent to restrain interstate commerce.

In acting on requests to charge outside of the hearing of the jury, the trial judge stated his intention to withdraw from the consideration of the jurors all matters relating to removers who resided in New Jersey but engaged in the refuse removal business in the Philadelphia area (113a). This matter came up at the conclusion of the original charge, and it then appeared that the Government did not object to the elimination of this question from consideration by the jury (160a).

Also at the time of dealing with the requests to charge, the trial judge flatly told counsel:

> "I am going to put it simply in terms that if they find that any of the refuse is dumped in New Jersey from Philadelphia customers that that will constitute interstate commerce." (112a)

An exception to this was immediately noted as follows:

> "Mr. Greenberg: I presume, sir, that the time to take exception to that is at the conclusion of the charge?

The Court: You had better indicate now if you have objection.

Mr. Greenberg: We object to that. Our position is that dumping is not part of the refuse removal business.

The Court: You will take exception to that?

Mr. Greenberg: That's all I meant." (112a)

Thereupon Government counsel inquired whether the Court would rule as a matter of law that the dumping procedure constitutes interstate commerce, with the credibility of the witnesses being for the jury.

"The Court: No, I am leaving it entirely to the jury even though there is no dispute. I am leaving it entirely to the jury to be satisfied beyond a reasonable doubt that trash picked up in Philadelphia is dumped in New Jersey, then I instruct you that interstate commerce is involved (2138). That is what I intend to instruct."

Thereafter in the main charge the trial judge instructed the jury as follows (136a):

"* * * If you find from the evidence, beyond a reasonable doubt, that refuse removers, who collect refuse in the Philadelphia area, dispose of appreciable quantities of such refuse in New Jersey, then I instruct you that the interstate commerce element of the offense with which the defendants are charged has been established.

What I mean to exclude by that definition is the casual dumping of a lot of trash. Anything more than a casual dumping of a load or two of trash, anything that has any degree of consistency or regularity, or involves any appreciable quantity, would satisfy the requirement of interstate commerce * * *"

After the conclusion of the main charge, the jury was excused again, and appellants' counsel took immediate exception as follows (154a-155a):

> "Mr. Greenberg: If Your Honor please, our first exception, of course, has to do with the definition of interstate commerce that Your Honor gave to the jury.
>
> You included a statement that, 'If you find that an appreciable quantity of refuse was dumped by a Penn —from Pennsylvania and New Jersey, that that is interstate commerce,' and in further explanation said that (2193), it is more than just a mere casual dumping, a load or two.
>
> Now we accept (*sic*) to that first, because we say that dumping is not an integral part of it, and, secondly, because this jury will have no basis to decide what is or is not appreciable without comment about percentages, based on the evidence.
>
> The Court: All right; I grant you an exception."

A few minutes later a further exception was noted as follows (159a-160a):

> "Mr. Greenberg: Excuse us, Your Honor.
>
> Mr. Savitz has brought up a question I believe we discussed yesterday, Your Honor, which was that where—when you talked about the definition you were going to give on interstate commerce, I think we brought up the fact that it is not only whether the business is in interstate commerce, but whether or not the objective of the conspiracy was to effect that part of the business that made it interstate commerce, and I think Your Honor made it clear at that time that if the business is in interstate commerce, then the conspiracy automatically is subjected to the Sherman Act.

I excepted to your definition today, and I think I covered that part of it.

The Court: Out of an abundance of caution (2199) I suggest that you take a specific exception, stating what it is that you would want me to charge on that point.

Mr. Greenberg: All right; we would want Your Honor to charge the jury that if they find interstate commerce, that this refuse-removal business is one engaged in interstate commerce, then, in addition, the object of the conspiracy must be the part of the business that is in interstate commerce.

The Court: All right; exception noted.

I think I have sufficiently covered that point."

The trial judge then recalled the jury and gave a supplemental charge including the following (164a):

"* * * There was also some objection taken to the manner in which I left the interstate aspect of this case.

I said to you that if you find that refuse removers pick up trash in Pennsylvania and haul an appreciable quantity of it to New Jersey, then you may find that the interstate aspect of the crime has been satisfied. I recognize that 'appreciable' is a very vague term.

I then went on to say to you that you are to consider that as opposed to, as I think I used the expression, a casual load or two taken over to New Jersey. *All I mean to convey to you, members of the jury, is that there was a sufficient movement of such trash from Pennsylvania to New Jersey that it could not be characterized as something that was just casual or inadvertent.* (Italics supplied.)

If you find that this was a part of a regular and consistent movement of trash from Pennsylvania to New Jersey, if you find that was part of the business

> of removing trash from Philadelphia area by these refuse collectors who operate in the Philadelphia area, then I say to you that the interstate commerce aspect of the crime has been established * * *''

The italicized sentence above, which was the Trial Judge's last word on the subject, is a definite instruction that there was a sufficient movement of trash from Pennsylvania to New Jersey; that it could not be characterized as casual or inadvertent. When this instruction is coupled with what was said before, the jury has to follow the Court's plain statement ''Then I instruct you that the interstate commerce element of the offense with which the defendants have been charged has been established'' (136a).

Before this supplemental charge was given the Court told the jury:

> ''Members of the jury, there are just one or two more things that have been pointed out to me.'' (162a)

The jury was thus alerted to the fact that the trial judge was about to make a change, qualification or clarification of what he had previously charged, and it must be assumed that the jury listened to each and every statement.

The italicized sentence included above was a flat instruction that there was a sufficient movement of trash from Pennsylvania to New Jersey that it could not be characterized as something that was casual or inadvertent, and thus in effect, by the entire charge and the supplemental charge, the jury was told that the element of interstate commerce was established.

It is well settled that whether a local or intrastate conspiracy restrains interstate commerce is primarily a factual question, and that there must be a verdict finding that the local activities "substantially affected interstate commerce".

See:

Las Vegas Merchant Plumbers Ass'n v. *United States*, 210 F. 2d 732, 747 (9th Cir. 1954), *supra*, cert. den. 348 U. S. 817 (1954);
Marks Food Corp. v. *Barbara Ann Baking Co.*, 274 F. 2d 934 (9th Cir. 1960);
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 284 F. 2d 1, 23-28 (9th Cir. 1960), reversed on other grounds 370 U. S. 19 (1962);
Cf.: *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379, 387 (9th Cir. 1962).

On the motion to set aside the verdict the trial judge held that defendants' argument depended upon taking an isolated sentence out of context, and that the instructions as a whole left it to the jury to determine whether the Government had established that the defendants' business involved interstate commerce (210a-211a).

The Court of Appeals accepted the view of the trial judge, but in doing so, found that the word "if" between "that there" was "unintentionally omitted by the judge or the stenographer", and that obviously the word "if" was needed for the completion of the sentence (App. A, p. 43,

infra). Neither the trial judge nor the Government suggested that any word had been inadvertently omitted by the judge or the stenographer. The most that the Government had argued was that the word "if" might be implied or that the sentence structure might be changed by moving punctuation (see p. 15, *supra*).

If the supplemental charge could be considered as leaving the matter at least in a state of confusion for the jury, that alone is sufficient to defeat any implication that the jury must have passed upon the interstate commerce question. However, the decision of the Court of Appeals puts forward new suggestions which leave the matter in a state of confusion.

If the word "if" was needed for the completion of the sentence as the Court of Appeals suggests, then one of the two "that"s in the sentence has to be read out and forgotten. In passing on the motion to set aside the verdict, the trial judge had every opportunity to criticize the Court reporter if he had left out something. The Government never criticized the Court reporter. At the time of the motion to set aside and later on the appeal to the Court of Appeals, it had to be assumed that the Court reporter made no mistake.

The opinion below does not suggest how the Court of Appeals has any power to change the record certified to the Court of Appeals by the Clerk of the District Court, or right to reason from an assumed change.

In a criminal case defendants are entitled to have the jury instructed in clear and consistent language and in a manner that is not confusing or misleading.

Mann v. *United States,* 319 F. 2d 404, 410 (5th Cir. 1962);
Perez v. *United States,* 297 F. 2d 12 (5th Cir. 1961);
Smith v. *United States,* 230 F. 2d 935 (6th Cir. 1956).

In the *Perez* case, *supra,* Hutcheson, C. J., said (p. 16):

"* * * It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other, and not misleading to the jurors. *Smith* v. *United States,* 230 F. 2d 935 (6th Cir. 1956). The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. *Smith* v. *United States, supra* * * *"

And in the *Mann* case, *supra,* Gewin, C. J., stated (p. 410):

"We are not unmindful of the case of Legatos v. United States, 9 Cir., 1955, 222 F. 2d 678, and Windisch v. United States, supra, which hold that when a charge as a whole fairly gives the law to the jury on the necessity of willfulness in an income tax evasion case, that one isolated part of the charge that a person is presumed to intend the natural consequences of his acts, does not constitute prejudicial error. Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that

one instruction is correct does not cure error in giving another inconsistent one. Perez v. United States, 5 Cir. 1961, 297 F. 2d 12. Counsel for Dr. Mann did not object to the charge as required by Rule 30 F. R. Crim. P. The sole defense of Dr. Mann was his contention that he did not intend to evade or defeat, the tax imposed; and he denied that his conduct was wilful or that he had any evil motive or intent to defraud. We think that an error affecting such a vital aspect of the case is fundamental. Rule 52(b) F. R. Crim. P. provides:

> " 'Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' "

See also:

Screws v. *United States,* 325 U. S. 91, 107 (1944).

The question of the disputed charge goes to a basic element of the case, *viz.,* the existence of jurisdiction under the Sherman Act, and this is important enough to justify a review by this Court.

The Court of Appeals purported to pass upon the point, but stated:

> "There was no objection to the now disputed sentence or any other part of the supplementary charge. There was no plain error involved. While the point is of course not rightly before us at all, we considered it advisable to dispose of the question on the merits so that there would be no possible doubt regarding it." (App. A, p. 44, *infra*)

It has already been shown at pp. 27-30, *supra,* that defense counsel noted his exceptions outside the hearing of

the jury at the time that requests to charge were being passed upon. Under these circumstances, it was wholly unnecessary for counsel to take a further exception in the hearing of the jury at the end of the supplemental charge.

A similar matter was passed on in *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U. S. 19 (1962), where it had been argued and the Court of Appeals had held that petitioners waived the objection by acquiescence in additional instructions given the jury after the general charge. This Court, however, in an opinon by Mr. Justice Clark, found that counsel for the petitioners had objected to the instructions in question at the time of conferences between counsel and the trial court before the general charge, and it had been understood that prior objections were preserved. Under these circumstances, this Court held that acquiescence in the added instructions could not be considered a waiver (op. cit. pp. 26-27).

In the present case, during the pre-charge conference, the trial judge advised defense counsel to take his exceptions then and there, and he did so (154a-155a, 159a-160a). Under the holding in *Sunkist Growers, supra,* it was unnecessary to repeat the objection.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Francis Hayden
Attorney for Petitioners
36 West 44th Street
New York, N. Y. 10036

Of Counsel

Stickles, Hayden, Kennedy,
Hort & Van Steenburgh
36 West 44th Street
New York, N. Y. 10036

Leonard M. Sagot
2 Penn Center Plaza
Philadelphia, Pa. 19102

Appendix "A"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 15529 TO 15533, INCL.

UNITED STATES OF AMERICA,

Appellee,

v.

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION; HARRY COREN; ARNOLD GRAF; SALVATORE GRAZIANO; AND EDWIN S. VILE,

Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 8, 1966

Before McLAUGHLIN, FORMAN and GANEY, *Circuit Judges*

Opinion of the Court

(Filed March 14, 1966)

By McLAUGHLIN, *Circuit Judge.*

Appellants-defendants were found guilty of violating Section 1 of the Sherman Antitrust Act.[1]

1. The Sherman Act, 15 U. S. C., § 1 reads:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor * * *."

Appendix "A"

Defendant Pennsylvania Refuse Removal Association is a non profit corporation comprised of persons and firms engaged in the refuse removal business in the Philadelphia area which includes the counties of Philadelphia, Bucks, Delaware and Montgomery. It is the result of a merger of the original Delaware Valley Refuse Removal Association which had been formed in 1960 and a similar South Philadelphia group. Its principal office is in Philadelphia. The individual defendants, Graziano, Graf and Vile, were officers or directors or both practically from the beginning and throughout the indictment period except Graf whose official position as Secretary-Treasurer ended in January 1963. Coren became President and a Director in 1962 when his South Philadelphia group joined with the Delaware Valley Association to form the present corporation. Graziano is Vice-President.

The indictment charged the defendants with engaging in a conspiracy in restraint of trade in refuse removal in violation of Section 1 of the Sherman Act. Refuse removal was defined as "the collection, removal, hauling and disposal of refuse;". Remover is defined as "any person or company engaged in waste removal;".

It was alleged in the indictment that the named removers and all those removers who were members of the Association during all or part of the critical period or of other co-conspirator companies or trade associations and other persons not made defendants, participated as co-conspirators in the charged offense and performed acts and made statements in furtherance of said offense.

At the trial there was substantial evidence that the Association through its members, including the individual defendants, agreed to fix prices, allocate customers, rig bids and coerce other refuse removers to join the conspiracy. There is evidence that the Association through its members agreed to raise prices by 25 to 50 per cent. In connection with this there is evidence of further agreement

of the Association by its members to coerce non members who were able to take business away from the Association group because of the latter's price rise. Proof was introduced that there was an agreement that the Association members were not to compete with each other and not to interfere with other members accounts. Sanctions were imposed on any member for so doing. Competition was eliminated between members on bidding for work.

At the oral argument it was conceded on behalf of appellants that the Government had presented sufficient trial evidence to support the convictions of appellants if the essential jurisdictional element of interstate commerce was present. The brief on behalf of appellants states:

> "For the purpose of this appeal, it has been assumed that the Government's evidence was sufficient to justify a finding by the jury that the defendants engaged in practices amounting to efforts to allocate customers and to refrain from competing for particular customers, and to maintain prices for refuse removal. Thus a verdict establishing violation of the Sherman Act would have been justified, provided that the essential jurisdictional element of interstate commerce was present."

Whether appellants' activities were in restraint of interstate commerce and whether the judge inadvertently withdrew that question from the jury in his charge are admittedly the sole issues before us.

Appellants' main effort is concentrated on their attempt to split up their refuse business into two parts. They assert the claim that they were merely engaged in local operations of collecting or removing refuse in the Philadelphia area. It was clearly established by testimony that refuse is disposed of as soon as a truck is loaded and

in no event later than twenty-four hours after collection. A major undisputed reason for this is that the truck must be emptied before it is ready for another load. It is also uncontradicted that the hauling away from the customers premises of the trash and the proper disposal of it is an important part of the one charge for the service.

The Government presented thorough proof that during the critical period at least fourteen members of the Association disposed of all or part of their collected refuse by trucking it over to New Jersey and dumping it in that state. In connection with this the statement of the case in appellants' brief contains the following:

> "Another alternative was to cross over the bridge to New Jersey and dump at a private dump there. Fourteen removers dumped some or all of the refuse which they collected in Philadelphia at a private dump or landfill in New Jersey during the indictment period."

The totals of those operations were not constant but in 1962 alone (highest year) the charges for that service totaled approximately $299,860. Appellants contend that the refuse is valueless and therefore not the subject of interstate commerce. From the record we are satisfied that the factual holding of the trial judge that "* * * the hauling and disposal of the refuse was an integral part of the refuse removal business" is entirely correct. In that situation the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state as a vital element of the one business operation was plainly a proper subject of interstate commerce. Hoke v. United States, 227 U.S. 308, 320 (1913). This is true despite appellants' claim that the refuse was their property. United States v. Hill, 248 U.S. 420 (1919). The contention of appellants that the refuse volume carried to New Jersey was relatively small does not in any way restrict the application

of the Sherman Act. Labor Board v. Fainblatt, 306 U.S. 601, 606 (1939).

The Government in this case relied upon the proposition that the complained of acts occurred within the "flow" of interstate commerce or "in commerce". The proofs fully supported that theory, the jury verdict and the judgment of the District Court. Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732, 739 n. 3 (9 Cir. 1954), cert. den. 348 U.S. 817 (1954). United States v. Frankfort Distilleries, 324 U.S. 293, 296 (1945).

The contention regarding the supplemental charge arose from the defense objection to the court's use of the word "appreciable" as too vague in connection with the disposal of part of the trash in New Jersey. As to this the judge in his supplemental charge first told the jury that he recognized that "appreciable" is a very vague term, that he had used it as opposed to "a casual load or two taken over to New Jersey". Then he said, as the transcript has it, "All I mean to convey to you, members of the jury, is that there was a sufficient movement of such trash to New Jersey that it could not be characterized as something that was just casual or inadvertent." Obviously the word "if" between "that there" was unintentionally omitted by the judge or the stenographer. Just as obviously the word "if" was needed for the completion of the sentence.

The judge in his base charge, using the word "appreciably" had unmistakably left the decision as to the nature of the trash disposals in New Jersey to the jury. He had told the jury:

> "If you find from the evidence, beyond a reasonable doubt, that refuse removers, who collect refuse in the Philadelphia area, dispose of appreciable quantities of such refuse in New Jersey, then I instruct you that the interstate commerce element of

the offense with which the defendants are charged has been established.

"What I mean to exclude by that definition is the casual dumping of a lot of trash. Anything more than a casual dumping of a load or two of trash, anything that has any degree of consistency or regularity, or involves any appreciable quantity, would satisfy the requirement of interstate commerce."

In the context of the charge it is most doubtful that the supplemental charge sentence caused any confusion whatsoever to the jury. In any event it was completely cured by the court's immediately following and final directive to the jury as follows:

"If you find that this was a part of a regular and consistent movement of trash from Pennsylvania to New Jersey, if you find that was part of the business of removing trash from Philadelphia area by these refuse collectors who operate in the Philadelphia area, then I say to you that the interstate commerce aspect of the crime has been established."

The court then asked counsel,

"Anything further gentlemen?" and counsel for the defendants answered, "No, sir."

There was no objection to the now disputed sentence or any other part of the supplementary charge. There was no plain error involved. While the point is of course not rightly before us at all, we considered it advisable to dispose of the question on the merits so that there would be no possible doubt regarding it.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,529

UNITED STATES OF AMERICA,

vs.

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION; HARRY COREN; ARNOLD GRAF; SALVATORE GRAZIANO; AND EDWIN S. VILE

PENNSYLVANIA
REFUSE REMOVAL ASSOCIATION,
Appellant.

(D. C. Criminal No. 21558)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 7, 1965, be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 14, 1966

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,530

UNITED STATES OF AMERICA,

vs.

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION; HARRY COREN; ARNOLD GRAF; SALVATORE GRAZIANO; AND EDWIN S. VILE

HARRY COREN,

Appellant.

(D. C. Criminal No. 21558)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

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Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,532

UNITED STATES OF AMERICA,

vs.

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION; HARRY COREN; ARNOLD GRAF; SALVATORE GRAZIANO; AND EDWIN S. VILE

SALVATORE GRAZIANO,

Appellant.

(D. C. Criminal No. 21558)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

JUDGMENT

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IDA O. CRESKOFF
Clerk

March 14, 1966

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,533

UNITED STATES OF AMERICA,

vs.

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION; HARRY COREN; ARNOLD GRAF; SALVATORE GRAZIANO; AND EDWIN S. VILE

EDWIN S. VILE,

Appellant.

(D. C. Criminal No. 21558)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

JUDGMENT

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Attest:

IDA O. CRESKOFF
Clerk

March 14, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1211

PENNSYLVANIA REFUSE REMOVAL ASSOCIATION, HARRY COREN, SALVATORE GRAZIANO AND EDWIN S. VILE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 39–44) is not yet officially reported. The opinion of the district court denying petitioners' motion for judgment of acquittal notwithstanding the verdict (R. 202a–212a) [1] is reported at 242 F. Supp. 794.

JURISDICTION

The judgment of the court of appeals (Pet. 45–48) was entered on March 14, 1966. The petition for

[1] "R." references ending in "a" are to petitioners' appendix below; those ending in "b" to the appendix filed by the United States below.

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certiorari was filed on April 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the business in which petitioners concededly restrained trade was in interstate commerce.

2. Whether the district court's instructions properly left the factual aspects of the interstate commerce question to the jury.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, * * * is hereby declared to be illegal * * *.

STATEMENT

Petitioners, an association of refuse removers and three of its principal officers, were convicted by a jury of restraining trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (R. 9a–16a, 166a, 213a–220a).[2] The individuals were placed on probation

[2] The evidence showed that during the relevant (1960–1963) period the members of the Association restrained competition in the refuse removal business by agreeing among themselves to fix prices, to allocate customers, to rig bids for removal services, and to coerce other refuse removers in the Philadelphia area to join the conspiracy or stop competing with the Association's members; and by carrying out their agreement. *E.g.*, Tr. 496–501, 505–507, 151–158, 164–165, 887–890, 1477–1479. The sufficiency of the evidence was not contested before the court of appeals (see pp. 4–5, *infra*) and is not an issue in this Court.

for two years and fined, and the Association fined (R. 213a–220a).

At trial, petitioners argued that they were not engaged in interstate commerce. With respect to this issue, the evidence showed the following. The Association's members collect and dispose of refuse for customers in Philadelphia (R. 20a–25a, 57a–58a, 101a–107a). The customer pays a single charge for the service, which covers both collection and disposal (R. 41a–44a, 57a–58a, 59a, 44b–45b). Disposal represents a significant cost in the refuse removal business, since refuse must be disposed of as soon as a truck is fully loaded (or, at the most within 24 hours thereafter) so that the truck may be available for further service (R. 22a, 24a, 32b, 35b, 37b, 94b), and since nearby dumping sites are limited and refuse removers must pay for the privilege of dumping (R. 25a–29a, 49a–51a, 73a–77a, 53b).

Between 1960 and 1963, at least 15 members of the Association (which had approximately 90 members in 1962) consistently dumped refuse at sites in New Jersey. The dollar amount they charged for the removal of trash that was disposed of in New Jersey varied from year to year and from remover to remover, but in 1962 the total was approximately $299,860 (R. 8b–9b, 11b–17b, 20b, 25b–29b, 40b–41b, 42b–48b, 51b–57b, 60b–62b, 64b–65b, 67b–70b, 72b, 73b, 76b–77b, 79b–80b, 88b, 89b, 91b, 92b, 96b, 97b–104b).

The trial judge originally charged the jury that, "[i]f you find from the evidence, beyond a reasonable doubt, that refuse removers, who collect refuse in the

Philadelphia area, dispose of appreciable quantities of such refuse in New Jersey, then I instruct you that the interstate commerce element of the offense with which the defendants are charged has been established." (R. 136a.) The court then distinguished between casual dumping and dumping that has "any degree of consistency or regularity, or involves any appreciable quantity" (R. 136a). In response to objection by petitioners, the court told the jury in a supplemental charge that "appreciable" was a vague term and reminded it (R. 164a–165a) that he had said:

> * * * you are to consider that [the term "appreciable"] as opposed to, as I think I used the expression, a casual load or two taken over to New Jersey. All I mean to convey to you, members of the jury, is that there was a sufficient movement of such trash from Pennsylvania to New Jersey that it could not be characterized as something that was just casual or inadvertent.
>
> If you find that this was a part of a regular and consistent movement of trash from Pennsylvania to New Jersey, if you find that was part of the business of removing trash from Philadelphia area by these refuse collectors who operate in the Philadelphia area, then I say to you that the interstate commerce aspect of the crime has been established.

The court then asked counsel, "Anything further, gentlemen?", and counsel for defendants answered, "No, sir" (R. 165a).

On appeal, petitioners conceded that if their conduct occurred in interstate commerce, it violated the

Sherman Act (Pet. 6). But they argued that it did not occur in interstate commerce and that the trial judge improperly removed the commerce issue from the jury because (petitioners contended) he told the jury that the movement of refuse to New Jersey could not be characterized as casual or inadvertent (Pet. App A 41). The court of appeals rejected petitioners' contentions and affirmed (Pet. App. A).[3]

ARGUMENT

The questions presented were correctly decided by the court of appeals. There is no issue warranting further review.

1. Fifteen witnesses testified without dispute that refuse was regularly dumped in New Jersey by members of the Association, and there was abundant evidence to support the finding by both courts below that petitioners' business was an integrated collection and disposal service for which the customer paid a single charge. Since an essential part of the business involved the regular movement of goods across State lines, it was within the reach of the federal commerce power (see, *e.g., Atlanta Motel* v. *United States,* 379 U.S. 241, 255–257; *Labor Board* v. *Fainblatt,* 306 U.S. 601, 606; *Hoke v. United States,* 227 U.S. 308; *United States* v. *Hill,* 248 U.S. 420) and hence subject to the Sherman Act (see, *e.g., Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495; *United States* v. *Frankfort Distil-*

[3] The same contentions had previously been made in petitioner's post-verdict motion for acquittal or for a new trial, which the district court denied in a memorandum opinion (R. 202a–212a).

leries, 324 U.S. 293, 298; *United States* v. *South-Eastern Underwriters Assn.,* 322 U.S. 533).

2. The trial judge did not withdraw from the jury the underlying factual question of whether the movement of refuse to New Jersey was regular.[4] The trial court had instructed the jury in its basic charge that, "[*i*]*f you* find from the evidence * * * that refuse removers * * * dispose of appreciable quantities of * * * refuse in New Jersey * * *" (R. 136a; emphasis added), the requisite effects on interstate commerce would be established. In his supplemental charge he re-emphasized "*if you* find that refuse removers pick up trash in Pennsylvania and haul an appreciable quantity to New Jersey [etc.] * * *" (R. 164a; emphasis added). And after explaining the term "appreciable quantity" he again emphasized that "*if you* find that this was part of a regular and consistent movement * * *, [and] *if you* find that was part of the business of removing trash from Philadelphia area * * * then I say to you that the interstate commerce aspect of the crime has been established" (R. 165a; emphasis added). The failure of petitioners' counsel to object indicates that they and all present understood the court to mean that the jury must find a regular interstate movement of trash to convict.

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[4] We note that petitioners did not make a timely objection to the charge on this ground. Their failure to give the judge an opportunity to correct any ambiguities in his supplemental charge is itself sufficient reason to bar further consideration of their contention. F.R. Crim. P. 30; *Stegall* v. *United States,* 279 F. 2d 872 (C.A. 6), certiorari denied, 364 U.S. 915; *Moore* v. *United States,* 262 F. 2d 216 (C.A. D.C.), certiorari denied, 359 U.S. 959.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
THOMAS R. ASHER,
Attorneys.

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